IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 26, 2007

STATE OF TENNESSEE v. CLIFTON DECHANCE HARRISON

Appeal from the Circuit Court for Sullivan County
Nos. S48,542; S48,600; S48,602; S51,088, S51,978 Phyllis H. Miller, Judge

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No. E2007-00344-CCA-R3-CD - Filed November 29, 2007

The defendant, Clifton Dechance Harrison, pleaded guilty to three counts of selling cocaine within 1,000 feet of a school, Class B felonies, *see* T.C.A. § 39-17-417(a)(3), -432(b) (2003); three counts of selling more than .5 grams of cocaine, Class B felonies, *see id.* § 39-17-417(a)(3), (c)(1); and one count of selling cocaine, a Class C felony, *see id.* § 39-17-417(a)(3), (c)(2). Pursuant to a plea agreement with the State, the defendant received an effective sentence of 20 years. In this appeal, the defendant challenges the trial court's denial of alternative sentencing, and we affirm. The case must be remanded to the trial court, however, for correction of numerous errors in the judgments.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed and Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

William A. Kennedy, Assistant Public Defender, for the appellant, Clifton Dechance Harrison.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and J. Lewis Combs and William Harper, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The defendant's convictions arise from presentments in five separate cases:

Case Number	Count	Offense
S48,542	1	Sale of cocaine
	2	Delivery of cocaine
S48,600	1	Sale of .5 grams or more of cocaine within 1,000 feet of a public secondary school

	2	Delivery of .5 grams or more of cocaine within 1,000 feet of a public secondary school
S48,602	1	Sale of .5 grams or more of cocaine within 1,000 feet of a public secondary school
	2	Delivery of .5 grams or more of cocaine within 1,000 feet of a public secondary school
S51,088	1	Sale of .5 grams or more of cocaine
	2	Delivery of .5 grams or more of cocaine
	3	Possession of cocaine with intent to sell or deliver
	4	Sale of .5 grams or more of cocaine
	5	Delivery of .5 grams or more of cocaine
	6	Sale of .5 grams or more of cocaine
	7	Delivery of .5 grams or more of cocaine
	8	Maintaining a dwelling where drugs are used or sold
S51,978	1	Sale of cocaine within 1,000 feet of a public secondary school
	2	Delivery of cocaine within 1,000 feet of a public secondary school

The defendant entered into a plea agreement with the state which provided for the following disposition of the charges:

Case Number	Count	Conviction Offense	Sentence
S48,542	1	Sale of cocaine	6 years
	2	merged with count 1	
S48,600	1	Sale of cocaine in a school zone	10 years, 8 years to be served at 100%
	2	merged with count 1	
S48,602	1	Sale of cocaine in a school zone	10 years, 8 years to be served at 100%
	2	merged with count 1	
S51,088	1	Sale of .5 grams or more of cocaine	10 years
	2	merged with count 1	
	3	merged with count 1	
	4	Sale of .5 grams or more of cocaine	10 years
	5	merged with count 4	

	6	Sale of .5 grams or more of cocaine	10 years
	7	merged with count 6	
	8	Dismissed	
S51,978	1	Sale of cocaine in a school zone	10 years, 8 years to be served at 100%
	2	merged with count 1	

The sentences in case numbers S48,542, S48,600, S48,602, and S51,978 were to be served concurrently to each other. The sentences in case number S51,088 were to be served concurrently to each other and consecutively to the sentences in the remaining judgments for a total effective sentence of 20 years.

At the plea submission hearing, the defendant agreed to the following facts as recited by the prosecutor:

> The State's proof in S51,978 and S48,600 and S48,602 would have been . . . that around October of 2003 the Sullivan County DTF set up surveillance of a residence located at 738 East Sevier Street in Kingsport and in Sullivan County. . . . The residence also was within, well within 1,000 feet of New Horizon School, which is a public secondary school for the City of Kingsport. . . .
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> On November the 4th of 2003 the DTF gave funds to Rhonda Quillen, who was a confidential informant, instructed her to go to 738 East Sevier and purchase cocaine from anyone that [sic] was there at that residence. . . . Ms. Quillen went to that residence, walked directly up to the defendant, purchased cocaine from him and gave him the money and . . . she was given what. . .TBI labs later confirmed. . .was .4 grams of a substance containing cocaine. . . . That would be the State's proof in S51,978.
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> In S48,600 the State's proof would be that on November the 24th, 2003 Kimberly Crouch was given drug funds by the Kingsport Vice Department and instructed to go to 738 East Sevier and purchase cocaine from anyone that she could purchase cocaine from. . . . She went straight to the 738 East Sevier and there met up with the defendant and also Kia Williams. . . . Ms. Crouch . . . gave money to both these individuals and . . . she was given cocaine back from both these individuals, that they split the transaction. The amount of the cocaine from the transaction was .9 grams . . . .

> In S48,602 the State's proof would be that the same confidential informant, Kim Crouch, was given funds and instructed to go back to 738 East Sevier. She . . . purchased cocaine from Alando Hayes and also from the defendant. They, too, split a transaction. The total amount of the cocaine was confirmed by the TBI lab to be .6 grams. . . .
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> The State's proof in S48,542 would be that on March the 11th, 2003 a confidential informant by the name of Robin Light was given funds . . . and told to make a purchase of cocaine on Dale Street. . . .[S]he went to Dale Street, was attempting to purchase cocaine from someone else, the defendant stepped up and . . . she made a purchase of cocaine from him . . . . [T]he amount of cocaine purchased by this confidential informant was .3 grams. . . .
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> In S51,088 the State's proof would be that . . . Officer Mark Johnson of the Kingsport Vice Department went to Riverview in an attempt to purchase cocaine. He went on February the 8th, 2005 and on March the 4th of 2005 and went on March the 8th of 2005. . . . [O]n each of those days Officer Mark Johnson met up with the defendant, gave him $80.00 in marked drug funds and purchased cocaine. . . . February the 8th, TBI confirmed it to be 1.2 grams, . . . Count Four it would be .7 grams and in the last count would be .7 gram[s] . . . .

During the colloquy with the trial court, the defendant pleaded guilty to the following charges:

Case Number	Count	Offense
S48,542	1	Sale of cocaine
S48,600	1	Sale of cocaine within 1,000 feet of a public secondary school
S48,602	1	Sale of cocaine within 1,000 feet of a public secondary school
S51,088	1	Sale of .5 grams or more of cocaine
	4	Sale of .5 grams or more of cocaine
	6	Sale of .5 grams or more of cocaine

Although the trial court and the parties indicated that the charges for delivery of cocaine would merge with the corresponding charges for sale of cocaine, the defendant did not plead guilty to these charges and the trial court made no findings of guilt. Nevertheless, the trial court entered judgment

forms for these offenses. Those judgment forms list no conviction offense and provide only that the charges were merged.

The trial court accepted the plea agreement and imposed the sentences provided for in the plea acceptance form. The trial court explained to the defendant that he would be required to serve 100 percent of the first eight years of his effective ten-year sentence for the sale of cocaine in a school zone. The defendant indicated his intent to seek probation or other alternative sentencing on the remaining two years of that sentence as well as the effective ten-year sentence for selling more than .5 grams of cocaine.

At the sentencing hearing, the defendant's parole officer, Ann Snodgrass, testified that on January 27, 2006, the defendant was paroled in Maryland and immediately transferred to Tennessee pursuant to a detainer warrant. Four days after being released on bond, the defendant reported to Ms. Snodgrass and tested positive for marijuana. The defendant reported as required until he was arrested on new charges three months later.

At the conclusion of the hearing, the trial court denied alternative sentencing based on the defendant's criminal record and social history. The trial court observed that the defendant had a poor work history, poor social history, and had no high school diploma or GED. The trial court also noted that the defendant continued to use illegal drugs while on bond and that he had "an illegitimate child [he] apparently [doesn't] support." The trial court also cited the defendant's history of violating both probation and parole.

I. Denial of Alternative Sentencing

In this appeal, the defendant claims that the trial court erred by denying probation or other alternative sentencing. The State contends that the trial court properly ordered the defendant to serve his entire sentence in confinement.

When a defendant challenges the manner of service of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the defendant. *Id*. If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing

alternatives by considering (1) the evidence, if any, received at the guilty plea and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b); -103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

A defendant who is an "especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6). An alternative sentence is any sentence that does not involve total confinement. *See generally State v. Fields*, 40 S.W.3d 435 (Tenn. 2001). As a standard offender convicted of both Class B and C felonies, the defendant is not presumed to be a favorable candidate for alternative sentencing. *See* T.C.A. § 40-35-102(6). Because the sentence imposed is ten years or less, however, the trial court was required to consider probation as a sentencing option. *See id*. § 40-35-303(a), (b). A defendant's potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. *Id.* § 40-35-103(5). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The trial court's determinations whether the defendant is entitled to an alternative sentence and whether the defendant is a suitable candidate for full probation are different inquiries with different burdens of proof. *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). When the defendant is entitled to the statutory presumption favoring alternative sentencing, the State must overcome the presumption by showing "evidence to the contrary." *Ashby*, 823 S.W.2d at 169; *State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled in part on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000); *see* T.C.A. §§ 40-35-102(6), -103. What constitutes "evidence to the contrary" can be found in Tennessee Code Annotated section 40-35-103, which provides:

> Sentences involving confinement should be based on the following considerations:
>
> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1).

The defendant is required to establish his "suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest[s] of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 297 S.W.2d 78, 81 (1956)), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10. Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

In this case, the trial court denied alternative sentencing based on its finding that the defendant had a lengthy history of criminal behavior and that the defendant had recently violated both probation and parole. The record supports the findings of the trial court. The presentence report establishes that the defendant has three prior convictions from the State of Maryland for possession of cocaine. He has no high school diploma or GED and a sporadic work history. The trial court found that the defendant had failed to support an illegitimate child. Given that the defendant is not presumed to be a favorable candidate for alternative sentencing, the trial court did not err by denying an alternative sentence. Unfortunately, because of numerous errors in the judgments filed in this case, our analysis does not end here.

II. Errors in the Judgment Forms

Although the trial court and the parties indicated that the charges in each case for delivery of cocaine would "merge" with the accompanying charges for sale of cocaine, the defendant did not plead guilty to these charges and the trial court made no findings of guilt. As a result, those charges are actually still pending in the trial court, and no judgment forms should have been entered relative to those charges. Under the doctrine of merger, findings of guilt on two or more offenses result in only one conviction. In this case, it is not entirely clear what the parties' understanding of the disposition of the "merged" offenses would be. Although it appears that the parties believed the delivery charges would simply disappear, merger does not accomplish this. When an offense is merged with another, it does not disappear; the finding of guilt remains and, should the conviction on the surviving judgment be reversed for any reason, the merged offense would remain. If it was indeed the parties' intent that the charges for delivery of cocaine and possession with intent to sell or deliver cocaine be dismissed, then the trial court should dismiss the charges. If it was the parties' intent for the charges to merge into the sale of cocaine convictions, then a finding of guilt on each offense is required. Upon remand, the trial court must determine the parties' intent regarding the charges for delivery of cocaine in Count 2 of S48,542, Count 2 of S48,600, Count 2 of S48,602, Count 2 of S51,978, and Counts 2 and 5 of S51,088 and the charge of possession of cocaine with intent to sell or deliver in Count 3 of S51,088.

We also note that the "Special Conditions" portion of the judgment forms entered in case numbers S48,600, S48,602, and S51,978, provides, "Defendant to serve day for day for the first 8 years." The trial court apparently added this provision based upon its understanding of Tennessee Code Annotated section 39-17-432, which provides:

> Notwithstanding any other provision of law or the sentence imposed by the court to the contrary, a defendant sentenced for a violation of subsection (b) shall be required to serve at least the minimum sentence for the defendant's appropriate range of sentence. Any sentence reduction credits the defendant may be eligible for or earn shall not operate to permit or allow the release of the defendant prior to full service of the minimum sentence.

T.C.A. § 39-17-432(c). However, the special condition is not necessary to ensure that the defendant serves the mandatory minimum sentence as provided by law. In the "Sentence Length" portion of the judgment forms, the trial court has correctly noted that the mandatory minimum sentence is eight years because the offense occurred in a school zone. The trial court has also noted that the offenses occurred in a school zone under the portion relating to release eligibility date. Thus, the "day-for-day" language is superfluous and should be deleted.

Finally, the following clerical corrections must be made to the remaining judgments:

Case Number	Count	Correction
S48,600	1	The conviction offense must be amended to sale of cocaine in a school zone rather than sale of .5 grams or more of cocaine in a school zone.
S48,602		The conviction offense must be amended to sale of .5 grams or more of cocaine in a school zone.
S51,088		Count 1 should be amended to reflect that the sentence is concurrent to Counts 4 and 6 rather than Counts 3 and 5. Count 4 should be amended to reflect that the sentence is concurrent to Counts 1 and 6 instead of Counts 1 and 5. Count 6 should be amended to reflect that it is concurrent to Counts 1 and 4 instead of Counts 1 and 3.
S51,978		The conviction offense should be amended to reflect that it is a Class B felony rather than a Class A felony.

CONCLUSION

The trial court did not err by denying alternative sentencing, and in consequence, the sentencing judgment of the trial court is affirmed. The case must be remanded, however, for the trial court to determine the parties' intent regarding the disposition of the charges for delivery of cocaine and possession of cocaine with the intent to sell or deliver and for the trial court to correct several clerical errors in the remaining judgments.

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JAMES CURWOOD WITT, JR., JUDGE